

**BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA**

In the Matter of:

**ANNA P.**

Claimant,

vs.

**HARBOR REGIONAL CENTER,**

Service Agency.

OAH Case No. L 2005080958

**DECISION GRANTING  
CLAIMANT'S APPEAL**

This matter was heard by Eric Sawyer, Administrative Law Judge, Office of Administrative Hearings, State of California, on May 11 and October 24, 2006, at the Harbor Regional Center located in Torrance, California. Cynthia J. Billey, Esq., of the Alliance for Children's Rights, represented Claimant.<sup>1</sup> Mona Z. Hanna, Esq., of Michelman & Robinson LLP, represented the Harbor Regional Center (HRC or Service Agency).

Testimonial and documentary evidence was presented during the hearing. The record was thereafter left open for the parties to present closing arguments by way of briefs. Claimant's brief was timely received and marked as exhibit C-II. The Service Agency did not submit a brief. The record was closed and the matter submitted for decision on November 6, 2006.

**ISSUE**

Did the Service Agency correctly assess Claimant's rating for purposes of the Adoptions Assistance Program (AAP) to be Level 3?

**EVIDENCE RELIED UPON**

Documentary: Service Agency exhibits A-Q; Claimant exhibits C-A through C-W and C-AA through C-BB, and official notice was taken of Claimant exhibits C-X through C-Z and C-CC through C-FF.

Testimonial: Dolores Burlison, HRC Director of Children's Services; Kong P., Claimant's adoptive father; and Youeth O., Claimant's adoptive mother.

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<sup>1</sup> Claimant and her family are referred to in a manner intended to protect their privacy.

## FACTUAL FINDINGS

### *Parties & Jurisdiction*

1. Claimant is a four-year-old female consumer of the Service Agency by reason of her diagnosis of developmental delays due to Shaken Baby Syndrome and mental retardation.

2. Claimant was previously removed from the care of her natural mother and was placed in foster care in Los Angeles County. Yoeuth O. and Kong P. adopted her through the Los Angeles County Department of Children and Family Services (DCFS) on October 20, 2005. Kong P. is Claimant's great uncle. Claimant lives at home with her adoptive parents, her brother Andy, age 5, and her adoptive parents' three biological sons.

3. Claimant is known as a "dual agency child," defined as one who is both a regional center consumer and in the foster care system, and therefore, eligible to receive services in both systems. Among benefits available in the foster care system are those provided under the Adoption Assistance Program (AAP). AAP provides financial incentives to facilitate the adoption of foster children who would otherwise remain in long-term foster care because of their circumstances and helps to alleviate the financial burdens that adoptive parents face when providing for children with special needs. AAP is administered by the California Department of Social Services (DSS).

4. By letter dated April 4, 2005, DCFS made a request to HRC for an Alternative Residential Model (ARM) rate letter on behalf of Claimant.<sup>2</sup>

5. By letter dated June 23, 2005, HRC responded to DCFS's request by contending that, pursuant to Welfare and Institutions Code section 16118, subdivision (a), it was DCFS's responsibility to provide financial aid for the AAP and that DCFS has the "responsibility for certifying the child meets the eligibility criteria and for determining the amount of financial assistance needed by the child and the adopting family." The letter concluded by stating that the Los Angeles County area regional centers would therefore stop providing ARM rate letters for the purposes of adoption assistance and that none would be issued by the Service Agency for Claimant.

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<sup>2</sup> The ARM is a scale reflecting the rate at which a licensed residential care facility would be reimbursed for providing care to an individual. Under applicable laws and regulations, rates are set according to the type of facility and the amount of care and supervision an individual would need. A person with minor deficits and limitations would be housed in a low-level facility at a relatively low rate, while a person with significant to severe impairments would be placed in a higher-level facility at a higher monthly rate.

6. On or after August 19, 2005, a Fair Hearing Request was submitted on Claimant's behalf seeking to compel the HRC to "provide [an] appropriate ARM rate letter for purposes of [the] AAP."

7. On October 18, 2005, a class action lawsuit was filed in the Los Angeles County Superior Court, entitled *Edward F., et al. v. Harbor Regional Center, et al.*, bearing case number BC341638, seeking to compel the involved regional centers to begin issuing ARM rate letters again. Claimant is one of the plaintiffs and the HRC is one of the defendants in that case.

8. On December 15, 2005, the parties in the *Edward F.* case (including the HRC and Claimant) reached an interim settlement, whereby the regional centers agreed to issue ARM rate letters upon request pending the resolution of the litigation.

9. Pursuant to the interim settlement agreement, HRC issued an ARM rate letter for Claimant, dated January 5, 2006, setting the suggested rate at Level 3 (\$1,948/month).<sup>3</sup>

10. Claimant objected to the suggested ARM rate and requested that a new rate letter be issued setting the ARM rate at Level 4G.<sup>4</sup> The HRC declined to do so. The parties agreed that Claimant would not need to file a new Fair Hearing Request on the issue of the appropriateness of HRC's suggested rate level.

#### *Claimant's Condition and Care Needs*

11. Claimant has severe mental retardation and global developmental delays caused by irreversible brain damage. Her primary diagnosis is non-accidental traumatic brain injury (status post evacuation of subdural right frontal hematoma, with multiple areas of infarct in the right temporal, right occipital, right paramidline, fronto-parietal, and left cerebellum) with spastic quadriplegia. She also has diagnoses of intractable seizure disorder, infantile cerebral palsy (total body involvement, though much more predominant on her left-side), bilateral amblyopia (decreased vision resulting from retinal hemorrhages) and asthma.

12. As a result of these disabilities, Claimant is non-ambulatory. She is unable to crawl or walk and she cannot stand up without assistance. She uses a wheelchair and also wears braces on her feet. Claimant is non-verbal; she does not speak except for some babbling. Claimant has reduced vision in her eyes (caused by the retinal hemorrhages), and will need additional eye surgery to prevent further loss of vision.

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<sup>3</sup> Effective July 1, 2006, the California Department of Developmental Services (DDS) increased the ARM rates across-the-board by three percent.

<sup>4</sup> Effective July 1, 2006, the ARM rate for Level 4G is \$4,386 per month.

13. Claimant has seizures daily, sometimes three to four times a day, which are controlled by medication (Trileptal). On March 12, 2006, she had a major seizure (7 to 10 minutes in duration) that required emergency treatment at Miller Children's Hospital. Her lab results were highly abnormal, and upon discharge, she was referred to her neurologist. On March 23, 2006, she was seen by Dr. Mary Kay Dyes, who increased her anti-seizure medication and prescribed additional medication in the event of another major seizure. Claimant also has asthma and uses a nebulizer machine.

14. Claimant is seen every two months by her pediatrician and neurologist, and regularly by her ophthalmologist.

15. Claimant attends a moderate-to-severe Special Day Class at Daniel Webster Elementary School. She is eligible for Long Beach Unified School District (LBUSD) special education based on her primary handicapping condition of severe orthopedic impairment and secondary condition of mental retardation. She receives curb-to-curb transportation with an aide to assist her on the bus due to her seizures. According to Rebecca Qualls, Claimant's teacher, Claimant requires "continuous assistance of her teacher and additional classroom aides to meet her special personal care needs and allow her to participate in the classroom and ensure her safety." Ms. Qualls also describes Claimant as being "totally dependent on the classroom staff for all her needs," including that she has to be fed (breakfast and lunch) and toileted twice a day (she wears diapers) by staff.

16. Claimant's Individual Education Plan (IEP), prepared by the LBUSD, shows that her skills (in all areas) are age equivalent to 3 to 12 months' development level and that she is working on toddler goals. The most recent developmental evaluation by LBUSD specialists notes that she has made minimal progress since her last report. She requires intensive small group instruction in order to meet her educational needs. She also requires nursing services in the classroom in that her teacher and classroom aides are required to watch and chart her seizures and consult with the family.

17. Claimant's most recent Client Development Evaluation Report (CDER), produced by the Service Agency, indicates that she functions at a developmental level of 11%, a severe deficit. According to the CDER, Claimant has no independent living skills: she cannot feed, bathe, dress herself, perform hygiene, and she is not toilet trained. She is non-ambulatory. She does not speak, read or understand language. According to her most recent Individual/Family Service Plan (IFSP), also produced by the Service Agency, Claimant "is dependent on adults for all her self-care skills." She is incontinent and in diapers at all times. She eats baby food and soft foods by mouth, and drinks out of a sippy-cup. She attempts to finger feed like a toddler. Her cognitive development is at a 6 month level; her language development is at a 0-2 month level; her gross fine motor skills are at a 4 month level; her social/emotional development is at a 6 month level; and her self-help skills are at an 8 month level.

18. Because of her severe deficits in self-care and severe limitations in physical coordination and mobility, Claimant's parents provide physical assistance with all of her daily living activities, as well as constant care and supervision. Her parents have to give Claimant her bath, wash her hair, brush her teeth, dress her, change her diapers and feed her. She cannot be left unattended because of her frequent seizures (her family watches to see if seizures occur and their duration to prevent risk of injury). Claimant needs assistance whenever she has a seizure. Claimant's adoptive mother quit her job as a cashier in order to provide care for Claimant. Her adoptive father also stays at home to provide daily care due to her seizures and the high level of care and supervision she requires.

*The Service Agency's Methodology in Setting Claimant's Suggested ARM Rate*

19. A collaborative effort to determine a uniform way of assessing ARM rate levels was undertaken by representatives of the Department of Social Services (DSS), DDS, the Association of Regional Center Agencies, Inc. (ARCA), certain regional centers, the County Welfare Directors Association (CWDA), and certain county child welfare agencies (collectively referred to as the "Workgroup"). The Workgroup concluded that provisions of the Welfare and Institutions Code had been misinterpreted by many to provide funding to foster care families caring for dual agency children similar to rates paid to a DDS facility. The rate system established by DDS for those facilities is based on a cost model designed to incorporate the actual cost of the service level of a facility, such as overhead costs, staffing and other administrative costs. The Workgroup concluded that foster care providers do not incur the same overhead costs incurred by those types of facilities, nor do they provide the same level of services. Thus, the Workgroup concluded that "the law does not provide for a non-vendored foster care provider to be paid a DDS ARM rate."

20. HRC's Executive Director, Patricia Del Monico, determined Claimant's suggested ARM rate, pursuant to the conclusions of the Workgroup, and after her personal review of Claimant's file. Ms. Del Monico developed a "framework" by which ratings would be Level 1, 2 and 3 only. If, for example, a child had mild mental retardation, but had no other problems, she would be rated Level 1. If a child was severely handicapped, wheelchair bound or had severe behavioral issues, she would be rated Level 3. All others were rated Level 2. This framework automatically excluded any Level 4 ratings, regardless of need, based on the Workgroup's conclusion that such children should be in a staffed facility, not a foster home, and therefore Level 4 ratings simply "did not apply." Based on that methodology, Ms. Del Monico determined that Claimant's suggested ARM rate was Level 3, since Claimant required the highest level of services.

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### *Other Relevant Facts*

21. On October 4, 2006, the Los Angeles Superior Court, in the *Edward F.* case, issued an injunction ordering the regional center defendants to immediately to resume issuing ARM rate letters requested by adoptive parents of dual agency children, thereby "restor[ing] the status quo prior to the date on which the Regional Centers ceased their compliance." In her decision, Judge Carolyn Kuhl found that regional centers are required by California Code of Regulations, title 22, section 35333, subdivision (c)(1)(C), to evaluate dual agency children and determine an appropriate ARM rate for the child and communicate it to DCFS, in order to enable DCFS to determine the maximum AAP benefit for which the child is eligible in accordance with law. Specifically, Judge Kuhl found that Regulation section 35333 requires regional centers to determine the facility rate "that would be paid for placement of the child in an institutional setting."

22. Many OAH decisions have also concluded that to properly determine the ARM rate level for purposes of the AAP, regional centers must determine the facility rate that would be paid for placement of the child in an institutional setting. (*See, e.g., Canyon C. vs. RCOC*, OAH No. L2002100299, at 3; *J.R. vs. SDRC*, OAH No. L2003060368, at 2-3; *Skylar S.-B. vs. NBRC*, OAH No. L2004110541, at 11.; *Russell M. vs. Harbor Regional Center*, OAH Case No. L2006030159; and *Courtney W. vs. Harbor Regional Center*, OAH No. L20060405 14.)

23. For at least eight years, and perhaps longer, the HRC, and other regional centers in Southern California, had provided ARM rate letters for dual agency clients, in which suggested rate levels included Level 4.

24. In September of 2004, HRC issued a letter to DCFS in which it provided information and guidelines it thought would be helpful to the DCFS in "making a[n] [ARM] rate determination . . . ." Levels 4E through 4G were described as follows:

Level 4E to 4G can be used for children with severe to profound mental retardation who may also be non-ambulatory; they may also have seizures controlled by medication; they may have cerebral palsy resulting in quadriplegia; they may have a gastrostomy tube or a tracheotomy; they may have periodic hospitalizations; there would usually be more frequent pediatrician and specialist visits and more frequent absences from school; they may have behavior challenges that could result in property damage or assaults on others. These levels assume a staff-to-client ratio of about 1 1/2:2.

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## LEGAL CONCLUSIONS

1. The Lanterman Developmental Disabilities Services Act (Lanterman Act) governs this case. (Welf. & Inst. Code, § 4500 et seq.)<sup>5</sup> An administrative “fair hearing” to determine the rights and obligations of the parties, if any, is available, and is referred to as an appeal of a service agency decision. (§§ 4700-4716.) Jurisdiction for this case was established. (Factual Findings 1-10).

2. Where one seeks eligibility for government benefits or services, the burden of proof is on her. (*See, e.g., Lindsay v. San Diego Retirement Bd.* (1964) 231 Cal.App.2d 156, 161 (disability benefits).) The standard of proof in such cases requires proof by a preponderance of the evidence, because no other law or statute (including the Lanterman Act) requires otherwise. (Evid. Code, § 115.) Since Claimant is requesting a service that the Service Agency has not before agreed to provide, i.e. an ARM rate letter stating a service level at Level 4G, Claimant has the burden of establishing entitlement to that relief by a preponderance of the evidence.

3. One goal of the Lanterman Act is to prevent or minimize the institutionalization of developmentally disabled persons and their dislocation from family and community. (§§ 4501, 4509, 4685, 4750 and 4751.) In addition, section 4648, subdivision (a)(2), states that services and supports “shall be flexible and individually tailored to the consumer and, where appropriate, his or her family.” Regional centers are also required to respect and support the decision-making authority of the family; be flexible and creative in meeting the unique and individual needs of families as they evolve over time; and meet the cultural preferences, values, and lifestyles of families. (§ 4685, subd. (b).)

4. The AAP is a federal and state program that provides financial incentives to promote the adoption of children in foster care and to help alleviate the financial burden parents face when providing for children with special needs. (42 U.S.C. § 673(a)(1)(A); § 16120.) The legislative intent of the AAP is “to benefit children residing in foster homes by providing the stability and security of permanent homes” to grow up in, instead of languishing in foster care. (§ 16115.5.)

5. Pursuant to section 16118, subdivision (c), either DSS or the county responsible for the person participating in the AAP determines the amount of benefits payable to the participant’s adopting family. To that end, DSS adopted California Code of Regulations, title 22, section 35333, which states in pertinent part:

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<sup>5</sup> All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

The AAP benefit is a negotiated amount based upon the needs of the child and the circumstances of the adoptive family. The responsible public agency shall negotiate the amount of the AAP benefit and make the final determination of the amount according to the requirements of this section.

Subdivision (c)(1)(C) of the same regulation addresses the maximum AAP rate for children who are also clients of a regional center, as follows:

If the child is a client of a California Regional Center (CRC) for the Developmentally Disabled, the maximum rate shall be the foster family home rate formally determined for the child by the Regional Center using the facility rates established by the California Department of Developmental Services . . . .

Regulation section 35333 also provides that the AAP rate must be based upon the "needs of the child and the circumstances of the adoptive family."

6A. Based on the above statutory schemes, it is concluded that the AAP rate for a dual agency child is established by answering a hypothetical question: if the child had to be placed in a group residential facility, instead of in her adoptive home, what service level facility would the child require? Regulation section 35333 specifically references an analysis based on the needs of the child and the circumstances of the adoptive family. There is nothing in the language of that regulation supporting exclusion of a Level 4 rating simply because the child was not placed in a facility. The regional centers had apparently interpreted the applicable statutes and regulations similarly for several years when they issued ARM rate letters, and advised DCFS how to determine ARM rates, without such a limitation. The Service Agency's methodology in this case for setting ARM rates is inconsistent with the provisions pertaining to the AAP, in that Level 3 is not the service level for children with the highest level of needs. Claimant's interpretation better harmonizes the requirements and stated intentions of both the AAP and the Lanterman Act. Claimant's interpretation was accepted by the Los Angeles Superior Court in the *Edward F.* case and in many OAH Decisions involving the same issue. (Factual Findings 11-24.)

6B. On the other hand, the Service Agency's interpretation of how the ARM rates should be set is inconsistent with the APP and Lanterman Act. For example, both statutory schemes support the provision of services based on the individual needs of the family in question. The Service Agency's methodology does not involve a particularized analysis, in that children deserving the greatest level of care would still not be entitled to an ARM rate letter with the corresponding Level 4 simply because the child lives at home. Both the AAP and Lanterman Act encourage families to keep a dual agency child at home, as opposed to being institutionalized. By excluding the highest rate level for children with the highest level of needs, the Service Agency's interpretation would tend to discourage families from adopting children with the highest level of needs and/or keeping them at home. (Factual Findings 11-24.)



7A. Residential facilities in which regional center consumers may be placed are rated by a service level,<sup>6</sup> as approved by a local regional center. The service levels range from 1 to 4, with facilities approved at Level 4 caring for the most severely disabled consumers. Level 4 is subdivided into Levels 4A through 4I, with increasing staff and professional consultant requirements corresponding to the escalating severity of the consumers' disabilities. (Cal. Code Regs., tit. 17, § 56004, subd. (c).)

Pursuant to California Code of Regulations, title 17, section 56004, subdivision (c)(2), Level 3 and 4 facilities are required to provide basic staffing levels as follows:

- (A) For Service Levels 3, 4A, and 4B, one direct care staff person for up to three consumers in the facility;
- (B) For Service Levels 4C, 4D, and 4E, one direct care staff person for up to two consumers in the facility;
- (C) For Service Levels 4F, 4G, 4H, and 4I, one direct care staff person for the first consumer in the facility.

California Code of Regulations, title 17, section 56013, subdivision (d), provides that Level 4 facilities are designed to enhance the capabilities of consumers with the following functional characteristics:

- (A) Severe deficits in self-help skills; and/or
- (B) Severe impairment in physical coordination and mobility; and/or
- (C) Severely disruptive or self-injurious.

7B. In this case, Claimant met her burden of establishing by a preponderance of the evidence that she is entitled to an ARM rate letter with a Level 4G rating. Claimant, by definition, meets the criteria set forth in Title 17 of the California Code of Regulations for placement in a Level 4G facility, if she had to be placed by HRC in an institutional setting. A Level 4G rating for Claimant is also consistent with HRC's September 2004 letter to DCFS, which described the conditions it then believed supported such a rating. Claimant has severe mental retardation, cerebral palsy with spastic quadriplegia, seizure disorder, and severe orthopedic impairment, and consequentially, is totally dependent on others to meet all of her self-care needs and requires full physical assistance with all activities of daily living and with physical coordination and mobility. In fact, given her severe deficits in self-care skills, severe limitations in physical coordination and mobility, significant health care challenges and her need for constant direct supervision and care at the highest (1:1) staffed level, the Service Agency could not realistically and safely place Claimant in a Level 3 facility. (Factual Findings 11-18.)

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<sup>6</sup> The regulations governing facility service levels are found at California Code of Regulations, title 17, section 56001 et seq.

### ORDER

Claimant Anna P.'s appeal from Harbor Regional Center's denial of her request for an ARM rate letter stating Level 4G is GRANTED. The Service Agency shall forthwith issue a new ARM rate letter to the Los Angeles County Department of Children and Family Services, and/or Claimant's adoptive parents, designating Claimant's service level to be Level 4G.

DATED: December 7, 2006

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ERIC SAWYER,  
Administrative Law Judge  
Office of Administrative Hearings

### **NOTICE**

**This is the final administrative decision. Both parties are bound by this decision. Either party may appeal this decision to a court of competent jurisdiction within 90 days.**